Jeuro Development Sdn Bhd v Teo Teck Huat (M) Sdn Bhd

HIGH COURT (MELAKA) — ORIGINATING MOTION NO 25-12 OF 1997
AUGUSTINE PAUL J
26 JUNE 1998

Arbitration *— Arbitrator — Powers of arbitrator — Arbitrator departed from Evidence Act 1950 — Award may only be set aside for arbitrator's misconduct — Whether arbitrator bound by Evidence Act 1950 — Whether departure from Evidence Act 1950 amounted to misconduct*

Arbitration *— Award — Setting aside — Application for — Arbitrator to make award on liability before award on damages — Six weeks to file notice of motion — Whether award on liability was complete award — Whether time started to run from award of liability or damages*

Words and Phrases *— 'Award' — Arbitration Act 1952 s 15*

The applicant was carrying on the business of real estate developers. The respondent was a building construction contractor and building project manager. The applicant and the respondent entered into an agreement ('the agreement') for the construction of a multi-storey condominium on a piece of land belonging to the applicant. Problems arose between the respondent and the respondent's sub-contractors, resulting in the applicant terminating the agreement. The respondent claimed damages for work done, loss of profit for the remaining uncompleted work and the retention sum held by the applicant, on the ground that the agreement was wrongfully terminated. The applicant argued that the respondent had breached the agreement.

The dispute was referred to arbitration. Both parties decided that the arbitrator would first decide on the question of liability and thereafter damages. After the arbitrator made awards on liability and damages, the applicant applied to have the arbitrator's awards set aside. The outcome of the application depended on the answers to two issues, ie whether: (i) the applicant had filed his notice of motion within the prescribed six-week period under O 69 r 4(1) of the Rules of the High Court 1980 ('the RHC'); and (ii) two letters dated 18 March 1993 and 1 April 1993 were properly admitted in evidence.

Held, dismissing the application:

(1) The award on liability was a decision on part of the controversy that was submitted to the arbitrator for his decision. It was not the complete award. It became complete only when the award on damages was also made. Therefore, the six-week period prescribed by O 69 r 4(1) of the RHC began to run only after the award on damages was made and published (see p 551F-G).

(2) The Evidence Act 1950 is not intended to apply to proceedings before an arbitrator and therefore, it is not a valid objection to

the proceedings that the arbitrator departed from it. An award made by an arbitrator may only be set aside on the ground of his misconduct within the meaning of s 24 of the Arbitration Act 1952. A departure from the rules of the Evidence Act 1950 does not amount to misconduct, unless the rule of evidence violated is based on natural justice and its infringement is repugnant to one's sense of justice and fairness (see pp 552E–I and 553A).

(3) The maker of the document had confirmed issuing the letter dated 18 March 1993 and therefore, it was properly admitted in evidence. There was no necessity to examine him further on it. If the applicant was dissatisfied with the letter, it ought to have cross-examined the maker on it which it did not. The confirmation of the letter dated 1 April 1993 by the employer of the maker made it prima facie reliable. There was no basis to dispute the reliability of the letter in the absence of any cross-examination to challenge its authenticity, accuracy and its probative value. In order to show that the admission of this letter had adversely affected the applicant, there ought to have been cross-examination on this letter to show that its contents would result in denial of justice to the applicant. In the absence of any such evidence, the admission of this letter had not prejudiced the applicant (see pp 554D–E, H–I and 555A).

[Bahasa Malaysia summary

Pemohon menjalankan perniagaan pemaju harta tanah. Penentang adalah kontraktor pembinaan bangunan dan pengurus projek bangunan. Pemohon dan penentang telah mengikat suatu perjanjian ('perjanjian tersebut') untuk pembinaan sebuah kondominium bertingkat-tingkat di atas sebidang tanah kepunyaan pemohon. Masalah telah timbul di antara penentang dan sub-kontraktor penentang, menyebabkan pemohon menamatkan perjanjian tersebut. Penentang menuntut ganti rugi untuk kerja yang dijalankan, kehilangan keuntungan untuk kerja yang belum selesai dan jumlah pengekalan yang dipegang oleh pemohon, atas alasan bahawa perjanjian tersebut telah ditamatkan dengan salahnya. Pemohon menghujahkan bahawa penentang telah melanggar perjanjian tersebut.

Pertikaian telah dirujuk kepada timbangtara. Kedua-dua pihak memutuskan bahawa penimbangtara terdahulunya akan memutuskan persoalan liabiliti dan selepas itu ganti rugi. Selepas penimbangtara membuat award atas liabiliti dan ganti rugi, pemohon memohon supaya award penimbangtara diketepikan. Keputusan permohonan bergantung pada jawapan kepada dua isu iaitu sama ada: (i) pemohon telah memfailkan notis usul dalam tempoh enam minggu yang ditetapkan di bawah A 69 k 4(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'); dan (ii) dua surat bertarikh 18 Mac 1993 dan 1 April 1993 telah diterima dengan betulnya sebagai keterangan.

Diputuskan, menolak permohonan:

(1) Award atas liabiliti merupakan keputusan pada sebahagian kontroversi yang diserahkan kepada penimbangtara untuk keputusan beliau. Ia bukanlah award sepenuhnya. Ia menjadi sempurna hanya apabila award atas ganti rugi juga dibuat. Maka, tempoh enam minggu yang ditetapkan oleh A 69 k 4(1) KMT bermula hanya selepas award atas ganti rugi dibuat dan diterbitkan (lihat ms 551F-G).

(2) Akta Keterangan 1950 tidak bertujuan terpakai kepada prosiding di hadapan penimbangtara dan dengan itu, ia bukanlah bantahan sah terhadap prosiding bahawa penimbangtara telah menyimpang darinya. Suatu award yang dibuat oleh penimbangtara hanya boleh diketepikan atas alasan salah laku dalam lingkungan maksud s 24 Akta Timbangtara 1952. Penyimpangan daripada kaedah-kaedah Akta Keterangan 1950 tidak terjumlah kepada salah laku, melainkan rukun keterangan yang dilanggar adalah berdasarkan keadilan asasi dan pelanggarannya bertentangan dengan sikap adil seseorang (lihat ms 552E–I dan 553A).

(3) Pembuat dokumen telah mengesahkan mengeluarkan surat bertarikh 18 Mac 1993 dan dengan itu, ia diterima dengan betul sebagai keterangan. Tiada keperluan untuk memeriksanya dengan lanjut. Andainya pemohon tidak puas hati dengan surat tersebut, ia sepatutnya memeriksa balas pembuat mengenainya yang tidak pun dilakukan. Pengesahan surat bertarikh 1 April 1993 oleh majikan pembuat menjadikannya boleh dipercayai secara prima facie. Tiada dasar untuk mempertikaikan kebolehpercayaan surat dalam ketiadaan apa-apa pemeriksaan balas bagi mencabar kesahan, kejituan dan nilai probatif. Bagi menunjukkan bahawa penerimaan surat ini telah menjejaskan pemohon secara bertentangan, pemeriksaan balas sepatutnya dijalankan ke atas surat ini bagi menunjukkan bahawa kandungannya akan menyebabkan penafian keadilan kepada pemohon. Dalam ketiadaan apa-apa keterangan demikian, penerimaan surat ini tidak memudaratkan pemohon (lihat ms 554D–E, H–I dan 555A).]

Notes

For cases on powers of arbitrator, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 726–732.

For cases on setting aside an arbitration award, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 762–778.

Cases referred to

Abdul Hamid v Muhammad Afzal (1927) ILR 8 Lah 329 (refd)

AC Ho Sdn Bhd v Ng Kee Seng (t/a Konsultant Senicipta) [1998] 2 MLJ 393 (refd)

Arbitration between Mohamed Ibrahim & Koshi Mohamed, Re [1963] MLJ 32 (refd)
Banks v Banks (1835) 1 Gale 46 (refd)
Bhaiya v Jogeshwan 52 All 938 (refd)
Dallinga and City of Calgary, Re (1975) 62 DLR 3d 433 (refd)
Deoki Nandan v Rajakumar AWN 124 (refd)
Erdman v Ingraham (1967) 280 NYS 2d 865 (refd)
Ganga Sahai v Lekhraj Singh 9 All 253 (refd)
General Medical Council v Spackman [1943] AC 627 (refd)
Hazi Ebrahim Kassam Cochinwalla v Northern India Oil Industries AIR 1951 Cal 230 (refd)
Howard v Wilson 4 Cal 231 (refd)
Kemp v Rose (1858) 1 Giff 258 (refd)
Lian Hup Manufacturing Co Sdn Bhd v Unitata Bhd [1994] 2 MLJ 51 (refd)
Ma Hnine v Ma Nyein Bwin 1936 Rang 191 (refd)
MacLean v The Workers' Union [1929] 1 Ch 602 (refd)
Municipal Corp of Delhi v Jagan Nath Ashok Kumar (1987) 4 SCC 497 (refd)
R v Deputy Industrial Injuries Commissioner, ex p Moore [1965] 1 QB 456 (refd).
R v Industrial Injuries Commissioner, ex p Ward [1965] 2 QB 112 (refd)
R v Marsham [1892] 1 QB 371 (refd)
R v War Pensions Entitlement Appeal Tribunal, ex p Bott (1934) 50 CLR 228 (refd)
Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (refd)
Suppu v Govindachgaryar (1887) 11 Mad 85 (refd)
TA Miller Ltd v Minister of Housing and Local Government [1968] 1 WLR 992 (refd)
Ward v Williams [1955] ALR 308 (refd)

Legislation referred to

Arbitration Act 1952 ss 13, 15, 22
Evidence Act 1950 s 2
Rules of the High Court 1980 O 69 r 4(1)(b)

Thara Singh Sidhu (*Thara Singh Sidhu*) for the applicant.
Pretam Singh (*D Krishna* with him) (*Fahrol Pretam & Co*) for the respondent.

Augustine Paul J: Jeuro Development Sdn Bhd ('the applicant') is a company incorporated in Malaysia and was at all material times carrying on the business of real estate developers. Teo Teck Huat (M) Sdn Bhd ('the respondent') is also a company incorporated in Malaysia and was at all material times carrying on the business of building construction contractors and building project managers. On 12 October 1992, the

A applicant and the respondent entered into an agreement ('the agreement') for the construction of a 13-storey condominium called the 'Legenda' on a piece of land belonging to the applicant. This agreement was the result of a letter dated 15 November 1991 awarding the contract to the respondent from Akitek KHP which had been appointed by the applicant to act for it. Pursuant to the agreement, the applicant was to pay the respondent a sum B of RM8,149,295 for building works and RM4,500,020 for other works. The respondent was given possession of the contract site on 1 December 1991. Subsequently, the respondent appointed Sepakat Tinggi Sdn Bhd ('Sepakat') and Ban Ho Builders Pte Ltd as its sub-contractors. Due to some problems that arose between the parties, Sepakat sealed the contract C site on 13 April 1993. On 26 April 1993, the respondent obtained a mandatory injunction against Sepakat for the surrender of the contract site. On 27 April 1993, Akitek KHP sent a notice to the respondent stating that the agreement had been terminated with immediate effect on the instructions of the applicant. In substance, the respondent's claim was for damages for work done up to 13 April 1993, loss of profit for the remaining D uncompleted work and refund of the retention sum held by the applicant, on the ground that the applicant had wrongfully terminated the agreement. The case for the applicant was that the respondent had sub-contracted the entire works in breach of the agreement; had breached several conditions of the agreement and that, accordingly, the agreement had been lawfully E determined.

The parties referred the dispute between them to arbitration in accordance with cl 34 of the agreement. The arbitrator appointed by them was Mr Khoo Eng Chin. At the commencement of the arbitration hearing, counsel for both parties agreed that the arbitrator shall first decide on the F question of liability and thereafter on damages. At the hearing, the respondent's counsel tendered for marking the following bundle of documents:

(1) respondent's bundle of documents Vol 1 marked as CBD1.

(2) respondent's bundle of documents Vol 2 marked as CBD2.

G (3) respondent's bundle of documents (pink cover) marked as CBD3.

(4) respondent's bundle of documents (red cover) marked as CBD4.

(5) respondent's bundle of documents (blue cover) — progress payment claims and architect's certificate of payment marked as CBD5.

H (6) respondent's bundle of documents (blue cover-core) marked as CBD6.

(7) bundle of pleadings marked as BP.

In support of its case, the respondent called two witnesses, namely, Teo Kwee Chuan ('CW1') and the architect Tony Khoo Heng Peng ('CW2') who were examined by the respondent and cross-examined by the applicant. I At the close of the case for the respondent, the applicant did not call any witnesses and submitted to the arbitrator that the respondent had failed to make out a case. The arbitrator did not agree. The award on liability was signed and published on 12 October 1996 and the award on damages on 30 January 1997.

On 13 March 1997, the applicant applied by motion to this court to have the awards made by the arbitrator set aside. At the hearing of the motion before me on 19 June 1998, both counsel agreed that its outcome is dependent on answers to the following two issues:

(a) Whether the applicant has filed his notice of motion within six weeks as prescribed by O 69 of the Rules of the High Court 1980 ('the RHC'); and

(b) Whether the two letters dated 18 March 1993 and 1 April 1993 contained in exh CBD5 were properly admitted in evidence. I shall now consider the two issues.

Whether the applicant has filed his notice of motion within six weeks as prescribed by O 69 of the RHC

The time period within which an application may be made to set aside an award made by an arbitrator is governed by O 69 r 4(1)(b) of the RHC which reads as follows:

> An application to the Court —
>
> ...
>
> (b) to set aside an award under section 24(2) of that Act or otherwise,
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> may be made at any time within 6 weeks after the award has been made and published to the parties.

The time period begins to run after the award has been made and published to the parties. The answer to this issue therefore depends on the meaning of the word 'award'. If both the awards that were made come within the meaning of the term, then the applicant would be out of time with regard to the first award. It will be recalled that at the commencement of the arbitration hearing, both parties agreed that the arbitrator shall first decide on the question of liability and thereafter on damages. Accordingly, the award on liability was signed and published on 12 October 1996 and on damages on 30 January 1997. The applicant filed the notice of motion on 13 March 1997. The respondent contended that the applicant was out of time with regard to his application to set aside the award on liability as the six-week period had expired since its publication. In support of his argument, he referred to *Re Arbitration between Mohamed Ibrahim & Koshi Mohamed* [1963] MLJ 32 where Rose CJ said (at p 32):

> 'Award' is not a term of art; and it seems to me that the test as to whether an award, be it final or interim, has been made must depend upon whether the order in question amounts to a decision. The principle is stated in the 16th Ed of Mr Russell's book on *Arbitration* at p 224: 'any form of words amounting to a decision of the questions referred will be good as an award. No technical expressions are necessary'.
>
> It seems to me that the order of 25 September does amount to a decision of some of the questions referred and that, although the order is of an interim nature, it nonetheless should be regarded as an 'award'.

A Accordingly, learned counsel contended that the award made on liability amounts to an 'award' and that the applicant is therefore out of time in applying to have it set aside. In his reply, learned counsel for the applicant contended that as the awards on liability and damages are connected, they should be regarded as one with the result that the motion of the applicant is not out of time.

B The word 'award' is not defined in the Arbitration Act 1952 ('the Act'). *Black's Law Dictionary* (6th Ed) defines it as:

> The decision or determination rendered by arbitration or commissioners, or other private or extra-judicial deciders, upon a controversy submitted to them; also the writing or document embodying such decision.

C Thus an 'award' is a decision made by an arbitrator on a controversy submitted to him. As the award must be on the controversy submitted for arbitration, the decision must be one that decides on all the issues involved in the controversy. It will be observed that the controversy between the parties was a claim for damages which is dependent on liability. The award D must therefore be a decision on these two issues. An award must be distinguished from an interim award. Section 15 of the Act provides that any reference in the Act to an award includes a reference to an interim award. *Black's Law Dictionary* (6th Ed) defines 'interim' as:

> In the meantime; meanwhile; temporary, between ... .

E Thus, an interim award is a temporary award on the controversy. Since an interim award is regarded as an award by the Act, it is subject to the six-week period prescribed by O 69 r 4(1)(b) of the RHC. The respondent would succeed in his submission if the award on liability is to be treated as an interim award. It is my view that the award that was made on liability F was not an interim award. It was a decision on part of the controversy that was submitted to the arbitrator for his decision. It is therefore part of an award. It is not the complete award. It became complete only when the award on damages was also made. This is because it is only at that stage that the arbitrator can be said to have made a decision on the controversy G that was submitted to him for adjudication. I therefore hold that the six-week period prescribed by O 69 r 4(1)(b) of the RHC began to run only after the award on damages was made and published. I am therefore unable to agree with the argument advanced by the respondent. The case relied on in support is not relevant as the issue in that case was whether the order made amounts to a decision.

H *Whether the two letters dated 18 March 1993 and 1 April 1993 contained in exh CBD5 were properly admitted in evidence*

It will be recalled that exh CBD5 was one of the bundles submitted by the I respondent to the arbitrator. It was marked as an exhibit. The two letters in question formed part of this exhibit. In his submission, learned counsel for the applicant said that one Tony Sheng was the person in charge of the project. He was the maker of the letter dated 1 April 1993 and was not

called by the respondent as its witness before the arbitrator. The letter relates to the 16th progress payment. Learned counsel said that CW2 was specifically asked about this letter and he denied having received it. This letter played a major part in the assessment of damages. With regard to the letter dated 18 March 1993, learned counsel contended that although CW2, the maker of the document, confirmed the contents of the letter, he was not examined on it. In his reply, learned counsel for the respondent said that based on s 2 of the Evidence Act 1950, the strict rules of evidence do not apply to arbitration with the result that it is not necessary to call the maker of the document. He further said that the applicant did not raise any objections when these letters were tendered, and, on the contrary, cross-examined the respondent's witnesses on these letters.

Proceedings before arbitrators are governed by s 13 of the Act which provides for, inter alia, examination upon oath or affirmation. When witnesses are required to be examined on oath viva voce examination is intended and the taking of evidence by affidavit is not a sufficient compliance with the provisions (see *Banks v Banks* (1835) 1 Gale 46). It is true that rules of evidence do not apply to proceedings before arbitrators. This is provided by s 2 of the Evidence Act 1950 which reads as follows:

> This Act shall apply to all judicial proceedings in or before any Court, but not to affidavits presented to any Court or officer nor to proceedings before an arbitrator.

The Evidence Act 1950 is therefore not intended to apply to proceedings before an arbitrator (see *Municipal Corp of Delhi v Jagan Nath Ashok Kumar* (1987) 4 SCC 497; *Hazi Ebrahim Kassam Cochinwalla v Northern India Oil Industries* AIR 1951 Cal 230). Thus, an arbitrator is not bound by the strict rules of evidence, and it is not a valid objection to the proceedings if he has departed from some technical rule of the Evidence Act 1950 (see *Suppu v Govindachgaryar* (1887) 11 Mad 85; *Howard v Wilson* 4 Cal 231). An award made by an arbitrator may only be set aside if he has misconducted himself within the meaning of s 24 of the Act. The meaning of the word 'misconduct' was explained by Raja Azlan Shah J (as his Highness then was) in *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 at p 211 in the following terms:

> In the law of arbitration, misconduct is used in its technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties which are cast on the arbitrator as such, for instance, failure to observe the rules of natural justice, appearance of bias or partiality. It also includes any irregularity of action which is not consonant with the general principles of equity and good conscience. These illustrations are not meant to be exhaustive. But failure to analyse and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated.

A departure from the rules of the Evidence Act 1950 does not per se amount to misconduct, unless the rule of evidence violated is one which is based on natural justice and an infringement of it is, therefore, repugnant

to one's sense of justice and fairness. Having said this, Monir says in his book entitled *Law of Evidence* (10th Ed) at p 12:

> In such a case, therefore, if the award is set aside, it is not because the arbitrator has not complied with the provisions of the Evidence Act, but because his act or omission amounts to 'misconduct' within the meaning of s 30 of the Arbitration Act 1940.

I also refer to the words of Evatt J in *R v War Pensions Entitlement Appeal Tribunal, ex p Bott* (1934) 50 CLR 228 at p 256:

> Some stress has been laid by the present respondent upon the provision that the tribunal is not, in the hearing of appeals, 'bound by any rules of evidence'. Neither it is. But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although the rules of evidence, as such, do not bind, every attempt must be made to administer 'substantial justice'.

Thus, if an arbitrator receives the evidence of one party in the absence of the other (see *Abdul Hamid v Muhammad Afzal* (1927) ILR 8 Lah 329; *Bhaiya v Jogeshwan* 52 All 938); or does not give a fair opportunity to a party to prove his case (see *Ma Hnine v Ma Nyein Bwin* 1936 Rang 191; *Ganga Sahai v Lekhraj Singh* 9 All 253); or disallows a party to cross-examine his opponent's witnesses; or bases his award on the result of a private inquiry (see *Deoki Nandan v Rajakumar* AWN 124); or where he was biased (see *Kemp v Rose* (1858) 1 Giff 258), his award will be set aside as the rule of evidence infringed in these cases is based on natural justice. The wrongful rejection of evidence on the ground that it is irrelevant or inadmissible will provide sufficient cause for judicial intervention where the refusal to admit evidence amounts to a denial of natural justice in that a party is denied the opportunity of presenting his case (see *General Medical Council v Spackman* [1943] AC 627); or where the refusal to admit evidence amounts to a refusal of jurisdiction (see *R v Marsham* [1892] 1 QB 371); or where the refusal to admit evidence is founded upon an error of law such as the misconstruction of a statutory provision (see *R v Industrial Injuries Commissioner, ex p Ward* [1965] 2 QB 112) or the misconception of the scope of a discretionary power (see *Ward v Williams* [1955] ALR 308). Where it is alleged that a tribunal has admitted improper evidence the test to be applied is whether such evidence has affected the decision reached (see *Re Dallinga and City of Calgary* (1975) 62 DLR 3d 433). It has been held that administrative tribunals may admit hearsay evidence (see *MacLean v The Workers' Union* [1929] 1 Ch 602; *R v Deputy Industrial Injuries Commissioner, ex p Moore* [1965] 1 QB 456). In *TA Miller Ltd v Minister of Housing and Local Government* [1968] 1 WLR 992, it was held that tribunals are entitled to act on any material which is logically probative even though it is not evidence in a court of law. I also refer to *Erdman v Ingraham* (1967) 280 NYS 2d 865 where it was held that the admission of hearsay without an opportunity for cross-examination

amounted to a denial of a fair hearing. This, to my mind, must be subject to the overriding principle that the admission of such evidence has affected the decision reached. Thus, an award made by an arbitrator must not be set aside unless there is something radically wrong in the proceeding (see *AC Ho Sdn Bhd v Ng Kee Seng (t/a Konsultant Senicipta)* [1998] 2 MLJ 393; *Lian Hup Manufacturing Co Sdn Bhd v Unitata Bhd* [1994] 2 MLJ 51).

In the light of the law that I have adverted to, I shall now consider whether the admission of the two letters in question by the arbitrator amounts to misconduct on his part.

Letter dated 18 March 1993

This letter is a certificate of payment showing that a sum of RM146,543.17 is due from the applicant to the respondent. It formed part of exh CBD5 at the arbitration hearing. Learned counsel for the applicant's complaint is that this letter was shown to CW2, the maker of the document, but he was not examined on it though he confirmed the contents of the letter. In my opinion, this objection has absolutely no merits. The maker of the document had confirmed issuing it and thus it was properly admitted in evidence. There is no necessity to examine him further on it. If the applicant was dissatisfied with the letter, it ought to have cross-examined CW2 on it which it did not.

Letter dated 1 April 1993

This letter is the 16th progress payment claim and was prepared by Tony Sheng, the project manager, and addressed to CW2. The material parts of the letter read as follows:

> We submit herewith our 16th progress payment claim for the sum of RM966,878.58 (Malaysian Ringgit nine hundred sixty six thousand eight hundred seventy eight and cents fifty eight only) as per attached break-down for your kind approval.

Though this document was not tendered through its maker, CW1 confirmed that it relates to his 16th progress payment claim. CW2 was unable to confirm whether he received it. As I said earlier, hearsay evidence is admissible in hearings of this nature provided that it has not adversely affected the other party. A perusal of the notes of evidence of the hearing before the arbitrator indicates that the two witnesses were not cross-examined by the applicant's counsel on this letter. The confirmation of the letter by CW1, the employer of the maker of the letter in question, makes it prima facie reliable. There is no basis to dispute the reliability of the letter in the absence of any cross-examination to challenge its authenticity and accuracy and therefore its probative value. In order to show that the admission of this letter has adversely affected the applicant, there ought to have been cross-examination on this letter to show that its contents are suspicious. In my opinion, the result of the cross-examination must have been such that CW1 was unable to answer questions on its value as a reliable piece of evidence. In that event, the probative value of the letter

would be in issue. That would result in denial of justice to the applicant unless the maker was called to resolve the doubts. In the absence of any such evidence, I am unable to say that the admission of this letter has prejudiced the applicant. In any event, the award of the arbitrator which was partly based on this letter reads as follows:

> The claimant submitted the 16th progress payment claim to the architect on 1 April 1993. This is evidenced in pp 204–211 of CBD5. There is no dispute by the respondent that such a claim was submitted.

The arbitrator's finding on the letter cannot be faulted in the absence of any cross-examination on its validity. Furthermore, the fact that the applicant did not call any witnesses at the hearing means that he is deemed to have accepted the truth of the respondent's case which includes the letter, bearing in mind the fact that the letter, though hearsay, is admissible before an arbitrator. In the absence of there having been any dispute on the submission of this claim as found by the arbitrator, its reliability cannot now be attacked.

Notwithstanding what I have said thus far, it is my view that if the applicant was not satisfied with the manner the letters in question were admitted in evidence, it ought to have applied to the arbitrator to state a case for the decision of the High Court under s 22 of the Act. This is particularly significant as the respondent's entire case proceeded on the basis of the bundle of documents tendered and marked. Having failed to do that, it cannot now attack the award on the ground that it is based on inadmissible evidence. In this regard, Russell in *The Law of Arbitration* (18th Ed) says at p 388:

> Improper rejection, reception or misconception of evidence
>
> If the parties wish to object to the reception of evidence, as the matter is a question of law, they should apply to the arbitrator to state a case for the court under s 21, and, if he refuses, should ask him to adjourn the proceedings so as to allow of an application to the court for an order directing him to do so. If they do not take this course, they cannot afterwards object to the award on the ground that the evidence was not admissible.

I am therefore unable to agree with the argument advanced by the applicant on this issue.

In the upshot, I dismiss the motion with costs.

Application dismissed.

Reported by Tan Cheng Siong